In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 893
(Formerly No. 566 Misc.)

CARYL CHESSMAN,
Petitioner,

vs.

HARLEY O. TEETS, Warden of the California State Prison, San Quentin, California,
Respondent.

Respondent's Brief

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QUESTION PRESENTED

Whether in the circumstances of this case, the State Court proceedings to settle the trial transcript, upon which petitioner's automatic appeal from his conviction was necessarily heard by the Supreme Court of the State of California, in which trial Court proceedings petitioner allegedly was not represented in person or by counsel designated by the State Court in his behalf, resulted in denying petitioner due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE MANNER IN WHICH THE RECORD WAS PREPARED, SUBMITTED TO CHESSMAN FOR CORRECTION, AND ADOPTED BY THE TRIAL JUDGE

On May 21, 1948, a trial jury in Los Angeles, California returned verdicts in criminal proceedings entitled "*The People of the State of California v. Caryl Chessman,*" No. 117963, No. 117964. Chessman was convicted of 17 felonies. It was a trial in which Chessman had rejected the aid of counsel. Before trial commenced, Chessman relieved private attorney V. L. Ferguson as counsel. The public defender was also relieved and again before trial an offer of aid from Deputy Public Defender Al Matthews was refused. As it is reported by the California Supreme Court, this is what occurred:*

> "* * * Forty-eight days before the trial began, defendant appeared for plea. He had previously been represented by counsel but at this time he said, 'I wish to represent myself.' The following colloquy took place:
>
> 'The Court: Are you a good lawyer?
>
> The Defendant Chessman: I think so.
>
> The Court: Few lawyers say they are good.
>
> The Defendant Chessman: I think I am a good enough lawyer.
>
> The Court: You don't want to trust it to a lawyer?
>
> The Defendant Chessman: I don't want to do it.
>
> The Court: What will probably happen, if we set this case down for trial, you will want a lawyer and then ask for a continuance. If you want to try your own case, there is no way we can tell you not to. You will have to try it or have somebody hired to represent you in plenty of time to try the case at the time it is set.
>
> The Defendant Chessman: I understand that.

People v. Chessman (1950), 35 Cal. 2d 455, at 466.
People v. Chessman (1951), 38 C.2d 166 at 173.

> The Court: Because many times men with past experiences such as you have had—you know the tricks of the trade, and they get a lawyer at the very last minute. You really want to try your own case?
> The Defendant Chessman: That is correct.'"

The Supreme Court further stated at page 467:

> "* * * The record further shows that defendant repeatedly refused to permit the public defender to represent him."

Another instance of Chessman's insistence on his right to represent himself occurs in the reporter's transcript, page 4, volume 1:

> "I wish to point out that it is my intention to act in propria persona at this time *and to continue to do so until such time as* it is legally established that I am not qualified to do so, and that I will not accept a court-appointed attorney."

The record contains no less than 35 instances thereafter wherein Chessman stated either to the court or to the jury or to both that he had elected to represent himself. Despite Chessman's positive rejection of counsel throughout the trial, he had the services of Deputy Public Defender Al Matthews as "legal adviser" as well as the services of an investigator of the Public Defender's Office, who in fact interviewed some of the thirty-four witnesses on his behalf (*People v. Chessman*, 35 Cal. 2d 455, at 466; Reporter's Transcript of the trial proceedings).

On June 23, 1948, Ernest R. Perry, the official reporter of the oral proceedings at the Chessman trial died (Rep. Tr. (6-25-49) pp. 14-18).

On June 25, 1948, following the denial of a motion for a new trial, Chessman made a motion under § 953e of the California Code of Civil Procedure to set aside and vacate

the judgment on the ground that Reporter Perry had died and that it was impossible to have a phonographic reporter transcribe the evidence recorded in the case. The motion was denied (Rep. Tr. (6-25-48), pp. 14-18). Chessman asked the California Supreme Court to prohibit preparation of the transcript. He was denied (*Chessman v. Superior Court*, Crim. 4950 Sup. Ct.).

Chessman did not at any time serve and file application for permission to prepare a settled statement in lieu of a reporter's transcript as was his apparent right under Rule 36 of the Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California.

On June 25, 1948, J. Miller Leavy, deputy district attorney, informed the court that prior to his death Reporter Perry had dictated six days of the oral proceedings recorded by him in the case; that, since Reporter Perry's death, the District Attorney's Office had taken steps to see that necessary expenses were obtained for the employment of a court reporter to transcribe the notes of the deceased reporter, so that the California Supreme Court would receive a complete record of all the testimony and all other matters necessary for determination of an appeal (Rep. Tr. (6-25-48), pp. 15-16).

Honorable Charles W. Fricke, trial judge, then stated that there existed the necessity in the proper administration of justice for the entire record of the trial to be prepared in as complete and full a manner as possible, so that justice might be done the appellant; he then ordered the clerk of the criminal court to request the county board of supervisors to provide such service and adequate compensation therefor to facilitate the preparation of a record on appeal (Rep. Tr. (6-25-48), p. 16).

Another court reporter, Stanley Fraser, was employed by the county to transcribe the notes.

By affidavits of Deputy District Attorney Leavy and Reporter Fraser, the California Supreme Court granted extensions from time to time to permit Reporter Fraser to complete transcription of Reporter Perry's notes remaining undictated and untranscribed at the time of his death on June 23, 1948, in order that a record on appeal might be presented to the California Supreme Court (Affidavits and correspondence contained in file in Supreme Court in Extension No. 2692 (3)).

On September 13, 1948, Grace Petermichael, transcriber for Reporter Perry for many years during his lifetime, filed in the clerk's office of Los Angeles County 646 pages of the reporter's transcript as dictated by Reporter Perry prior to his death and as transcribed by Grace Petermichael. This was done by Grace Petermichael at the direction and request of Deputy District Attorney Leavy (Affidavit of Grace Petermichael, contained in the superior court file, of which there is a certified copy submitted along with affidavits on this hearing; "Second Affidavit," J. Miller Leavy, Exs. "D" and "E").

On February 24, 1949, Deputy District Attorney Leavy filed in open court in Department 43 in the Chessman matter the portion of the reporter's transcript up to that date dictated and transcribed by Reporter Fraser from the deceased reporter's notes, consisting of pages 647 to 1,558, inclusive, along with that portion of the reporter's transcript prepared by Grace Petermichael from the dictation of Reporter Perry during his lifetime, consisting of pages 1 to 646, inclusive; the record up to that date was offered to the court for settlement under Rules 36(a) and (b) of the Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, as formulated by the Judicial Council (Rep. Tr. (2-24-49), pp. 2-5).

On April 11, 1949, the remainder of the reporter's transcript, as dictated and transcribed by Reporter Fraser, consisting of the argument of the prosecution and the defense, —pages 1,559 to 1,810, inclusive,—was filed by Deputy District Attorney Leavy in open court in Department 43 and offered for settlement under Rules 36(a) and (b), Rules on Appeal, as formulated by the Judicial Council (Rep. Tr. (4-11-49), pp. 6-7).

The court received and ordered filed the remainder of the reporter's transcript as prepared by Reporter Fraser to be used as a basis of settling the record under Rules 35 and 36(a) and (b), Rules on Appeal. The court directed the clerk to serve the transcript upon Chessman and ordered the clerk to notify Chessman that he was required to present any objections, corrections or additions to the transcript he might have. Chessman was also informed that if additional time was required for presentation of corrections, such would be allowed if necessary (Rep. Tr. (4-11-49), pp. 9-10).

The California Supreme Court granted to Chessman to and including May 18, 1949, within which to submit to the superior court proposed corrections to the reporter's transcript as filed with the county clerk of Los Angeles on April 11, 1949.

The California Supreme Court, at the same time, denied, *without prejudice*, Chessman's application for an order directing his removal from San Quentin State Prison to Los Angeles County Jail for the purpose of presenting his proposed objections to the superior court (Extension No. 2704, files of the Supreme Court of the State of California).

We do not find that Chessman ever directly requested the trial court to order his physical presence on the settlement of the record on appeal, nor do we find action by appropriate writ seeking remedy (Supp. Cl. Tr. (as certified, 7-11-49) Ex. 1).

On May 12, 1949, Chessman filed his corrections in superior court. The document is variously entitled "Motion to Correct and Augment Record (Reporter's Transcript)" and "Defendant-Appellant's List of Inaccuracies and Omissions in the Record (Reporter's Transcript)" (Supp. Cl. Tr. (as certified July 11, 1949), including Exhibit 1).

On June 1, 2, and 3, 1949, in Department 43 of the superior court, Judge Fricke heard and considered all of Chessman's proposed list of inaccuracies and omissions in the record (Supp. Cl. Tr., as certified June 28, 1949 (with Exhibits 1, 2 and 3); Rep. Tr. (6-1-49), pp. 14-83).

On June 1, 2, and 3, 1949, the court, in hearing and determining Chessman's list of inaccuracies and omissions in the record, had the benefit not only of Chessman's list, but also of a memorandum prepared by Reporter Fraser, as well as notes of the trial judge. This memorandum prepared by Reporter Fraser was a comparison of Chessman's list of proposed corrections and omissions with the original notes of Reporter Perry recorded by him at the trial. The court likewise had the use of a memorandum prepared by Grace Petermichael, who transcribed pages 1 to 646, inclusive, of the reporter's transcript (Supp. Cl. Trs., as certified on June 28 and July 11, 1949 (including Exhibits 1, 2 and 3); Rep. Tr. (6-1-49), pp. 19-26).

The court then approved the transcript under Rules 35 and 36, Rules on Appeal of the Judicial Council, and stated:

> "The Court has now gone over the entire transcript, the entire objections and suggestions by the appellant for correction of the transcript and now certifies that all objections made thereto have been determined * * * the transcript has been corrected in accordance with the Court's determination * * * The Court further certifies that the transcription of the testimony and proceedings just reviewed by the Court have been

satisfactorily completed and the transcript is hereby approved * * *

"* * * The Court has therefore endeavored to the best of its ability to comply with the proceedings as they would be conducted under Rule 35 and also under Rule 36, having in mind the primary desire to present to the Supreme Court of this State as complete and accurate a record as possible and in these proceedings the Court has not considered the requirements upon the appellant of preparing a statement but has treated the transcription of the shorthand notes by Mr. Fraser as the basis of establishing a transcript on appeal in this case." (Rep. Tr. (6-1-49), pp. 82-83)

The record was then forwarded to the California Supreme Court and to Chessman.

This is the proceeding which has been minutely examined by the many courts passing upon the various Chessman appeals or petitions.

SUMMARY OF ARGUMENT

The petitioner, Caryl Chessman, elected to defend himself and refused assistance of counsel on more than one occasion. His failure to assist in preparation of the transcript compelled the State to resort to the procedure used. The lack of personal appearance by Chessman at the proceeding settling the transcript were dictated by public safety requirements and by his peculiar status as a convicted felon. The failure of Chessman to be represented by counsel at such proceedings was compelled by his prior persistent refusal to accept counsel. There was no lack of due process in a proceeding which is entirely appellate in nature and at which issues of fact were not being tried. There was no discrimination in the proceedings as to Chessman, and there was no showing that any different result would have

obtained even allowing all of Chessman's corrections and even assuming his personal appearance. The proceedings held in connection with the settling of the trial transcript have been reviewed almost annually and have been determined to be complete so far as due process requirements are concerned. The mode of transcript preparation has been specifically adjudicated as to competency and fairness, and for all of these reasons here set forth, Chessman does not spell out in any manner a violation of the due process requirements as to his cause.

THE SETTLEMENT METHOD ADOPTED IN VIEW OF THE REFUSAL OR FAILURE OF CHESSMAN TO SUBMIT A SETTLED STATEMENT UNDER THE RULES ON APPEAL WAS REASONABLE AND PROPER UNDER THE CIRCUMSTANCES

Admittedly the situation ensuing upon the death of Reporter Perry was unique. The court was confronted with the fact of conviction calling for the death penalty after a lengthy trial accorded Chessman. The alternatives of action at that time were most limited and became singular upon the refusal or failure of Chessman to move forward under Rule 36(b) of the Rules on Appeal as formulated by the Judicial Council by seeking application for permission to prepare a settled statement in place of the uncompleted transcript. The alternative was preparation of the trial transcript by the method selected since the possibility of a new trial did not exist. California Penal Code, § 1181 sets forth the exclusive grounds upon which the court may grant a new trial in a criminal case and the death of the court reporter and the attendant inability upon his part to prepare the trial transcript is not one of the enumerated statutory grounds.

As stated in *People v. Chessman*, 35 Cal. 2d 455, at 459, 460:

"* * * Furthermore, neither the death of a reporter nor impossibility of procuring a transcript is a ground for granting a new trial. Section 1181 of the Penal Code provides that 'When a verdict has been rendered against the defendant, the court may, upon his application, grant a new trial, *in the following cases only*:' [Italics added.] It enumerates seven grounds, none of which encompasses the situation depicted here."

If any attempt were made to grant Chessman a new trial, it would have been subject to attack upon the part of the prosecution by way of prohibition; it would have been subject to attack upon the part of Chessman himself by way of prohibition, and if conceivably the commencement of a second trial were reached, this defendant would be fully entitled to raise the plea of double jeopardy. Viewed against these considerations the employment of substitute Reporter Fraser became the exclusive and proper method for preparation of Reporter Perry's notes.

THE SETTLEMENT PROCEDURE HAS BEEN EXHAUSTIVELY EXAMINED BY FEDERAL AND STATE COURTS AND FOUND TO BE SUFFICIENT

The narrated manner in which the trial transcript was settled has heretofore been examined by state and federal courts. The Chessman record has been sifted through the screening judgments of many courts and in no case has relief been granted. Neither state nor federal judges have discovered material error in the transcript nor in its method of preparation. Whether Chessman's allegations of error have been founded upon lack of due process, equal protection or insufficiency of the evidence the courts have displayed a steady unity in refusing his claims.

A. Review of the State Court Decisions.

Commencing in May of 1950 is the parade of judicial review, and in *People v. Chessman*, 35 Cal. 2d 455, the California Supreme Court had squarely presented to it the lawfulness of the manner in which the trial record was prepared. The opinion furnishes a complete discussion of the method used, approves of it, and makes the cogent observation that it is essentially a question of fact as to whether or not one good shorthand reporter can read and transcribe with substantial accuracy the notes of another. In this Chessman decision the court measures the right of Chessman to be present upon settlement of the record by referring to his status as a convicted defendant, lawfully confined at San Quentin State Prison and goes on to state:

> "* * * He was not and is not entitled as a matter of right to go about the state making appearances before courts to present legal arguments. Neither reason, public policy, nor any express provision of law requires defendant's personal presence at proceedings to determine the accuracy of a transcript. From a time before his trial began defendant has repeatedly claimed, as he does now, that in connection with his representation of himself he is entitled to rights and should be accorded privileges greater than those of a defendant who is represented by counsel * * *" (35 Cal. 2d 455, at 467.)

This first Chessman decision is to our way of thinking a complete review of all of this litigant's various claims as alleged and re-alleged throughout the years, save certain claims which occurred to him near some of the end cases in this litigation.

In December of 1951 there followed *People v. Chessman*, 38 Cal. 2d 166, and again the court considered the sufficiency of the transcript and stated at page 172:

"* * * Reexamination of these arguments and of the transcript leaves us convinced that the transcript permits a fair consideration and disposition of the appeal."

This was the automatic appeal provided by California law in all death penalty cases (California Penal Code § 1239) and in which all of the judgments of conviction were affirmed. The United States Supreme Court denied certiorari (343 U.S. 915 [72 S.Ct. 650, 96 L.Ed. 1330]) and a petition for rehearing (343 U.S. 937 [72 S.Ct. 773, 96 L.Ed. 1344]).

In October, 1954, came *In re Chessman*, 43 Cal. 2d 391, wherein Chessman was before the court on a motion to vacate stay of execution of judgment imposing death penalty, and again the court denied relief based upon Chessman's attacks upon the transcript and rejected an allegation of fraud raised for the first time in July, 1954. In this Chessman decision Justice Schauer in reviewing Chessman's past and newly contrived claims stated at page 404:

"* * * This particular assertion as to the inadequacy or inaccuracy of the transcript is but a further item in the long-continued and reiterated attacks on the transcript which have been presented to, and resolved against defendant by, not only the superior court and this court but also by the United States District Court, the United States Court of Appeals, and the Supreme Court of the United States. If this assertion was to be urged it should have been presented to the superior court in 1949 and to this court upon the motion in respect to the transcript which was adjudicated in People v. Chessman (1950), supra, 35 Cal. 2d 455."

B. Chessman Decisions in the Federal Courts.

Because of the many Chessman decisions only those we deem most pertinent will be discussed; however, for a complete history of Chessman appeals and proceedings in

habeas corpus, reference is made to *In re Chessman*, 128 F.Supp. 600, and footnotes there set forth; *Chessman v. Teets*, 138 F.Supp. 761 at 763, and footnotes therein.

The United States Supreme Court has denied certiorari upon five occasions; granted certiorari in *Chessman v. Teets* (1955), No. 196 October Term, 1955, and remanded the cause to the United States District Court, Northern District of California, Southern Division, solely for consideration of the factual issue as to whether or not the trial transcript was corruptly or fraudulently prepared. The court did not direct specific inquiry into the element of due process attendant upon the failure of Chessman to be personally present upon the settling of the record. Judge Goodman in his opinion of January 31, 1956, *Chessman v. Teets*, reported in 138 F.Supp. 761, states at page 765:

> "There is not a scintilla of verity in the allegations made in the petition. The evidence not only does not disclose the existence of a single fact from which even an inference of fraud or impropriety may be drawn, but clearly and persuasively shows that the judge, the district attorney and the reporter diligently endeavored to the best of their ability and to the extent of their ingenuity to complete a fair and proper record and transcript for the use of the Supreme Court of California * * *"

In 1953 in *Chessman v. People*, 205 F.2d 128, the United States Court of Appeals, 9th Circuit, considered the applicability of the due process provisions of the Fourteenth Amendment to the Chessman matter and held at page 131:

> "There is no merit in the contention that the due process provisions of the Fourteenth Amendment were violated."

In its most recent opinion dealing with Chessman, *Chessman v. Teets*, United States Court of Appeals, 9th Circuit;

Case No. 15092, Oct. 18, 1956, the court squarely passed upon the question of due process holding:

> "That precise question, however, has heretofore been considered, and decided adversely to appellant, by both the California supreme court and this court.
>
> In holding against appellant on a similar contention, the California supreme court said:
>
> '* * * Neither reason, public policy, nor any express provision of law requires defendant's personal presence at proceedings to determine the accuracy of a transcript. * * * In the trial court he was repeatedly offered and refused counsel * * *. In these circumstances he cannot complain that he has been prejudiced by the fact that he has not, since his conviction, been allowed to appear personally in court.' People v. Chessman, 35 Cal. (2d) 455, 467, 218 P. (2d) 769, 776.
>
> When the identical question was before this Court in 1953, we held against Chessman, saying:
>
> 'There is no merit in the contention that the due process provisions of the Fourteenth Amendment were violated. The Constitution gives no right to appear in person or by counsel on a criminal appeal. Whether to grant an appeal, and the terms upon which it will be granted are purely matters of local law over which federal courts have no control.' [Citing and quoting Andrews v. Swartz, 156 U. S. 272, 274-275.] * * * And that there can be no denial of due process in the procedure used to settle the record on appeal, see Dowdell v. United States, 221 U.S. 325, 328-329, 31 S. Ct. 590, 55 L.Ed. 753.' Chessman v. People, 205 F. (2d) 128, 131.
>
> These decisions should not be construed as holding that the Fourteenth Amendment does not apply to settlement proceedings. It clearly does, as evidenced by

the fact that our later decision in the instant case was reversed on the ground that appellant's charge of fraud in connection with such proceedings invoked the Fourteenth Amendment. Similarly, had appellant charged fraud in connection with the argument to, or consideration by, the California supreme court, the Fourteenth Amendent would have been invoked.

But, although the Fourteenth Amendment stands in the way of fraud at any stage of litigation, it does not follow that it also guarantees the personal appearance of the defendant at every stage. That it does not afford such a guarantee in connection with settlement proceedings, is the proposition we were stating in the above quotation. The basic premise of this proposition is that the proceeding in which the transcript was certified was part of the appeal procedure, and not a part of the trial at which appellant's conviction was obtained.

We adhere to that basic premise. Due process does not require the personal presence of a prisoner, *even in a capital case*, for the consideration of his appeal. See Schwab v. Berggren, 143 U.S. 442, 36 L.Ed. 218, 12 S.Ct. 525.

It is true that in such settlement proceedings there are questions of fact to be determined. However, they are questions having to do with the settling and certification of the transcript for purposes of appeal. They involve no inquiry into the guilt or innocence of the defendant. *Thus, while the substitute reporter testified at the settlement hearing, he did not appear as a witness for or against the accused.* A similar contention that due process required the presence of a defendant at the hearing where the record was amended and certified was specifically rejected in Dowdell v. United States, 221 U.S. 325, 55 L.Ed. 753, 31 S.Ct. 590." (Emphasis supplied.)

THE RECORD IS CLEAR THAT CHESSMAN REJECTED THE ASSISTANCE OF COUNSEL IN A CRIMINAL PROCEEDING WHERE POSSIBILITY OF CONVICTION EXISTED RESULTING IN HIS PECULIAR STATUS AS A FELON WITH CURTAILED RIGHTS

As set forth in the statement of facts the record is clear that Chessman was bent upon defending his own cause. This was his constitutional right, and California was bound to recognize it. As further illustration of the persistent refusal of Chessman to avail himself of the benefit of counsel at the trial is the proceeding which took place in the superior court in Los Angeles on April 29, 1948, in connection with a motion made on that date by the defendant.

Chessman appeared in the trial court before commencement of trial seeking to withdraw his plea. At the outset of the hearing on April 29th, Judge Fricke stated to him: "* * * if you will just keep in mind that when a man acts as his own attorney, *he does not have any greater rights than any attorney would have in trying a case.*" (Emphasis supplied.) (Rep. Tr. Vol. 1, p. 1) Chessman at that time asked the court to appoint three psychiatrists to examine him to determine his sanity and whether he was legally qualified to act in propria persona. We repeat what Chessman said at that time: "I wish to point out that it is my intention to act in propria persona at this time ~~and to~~ *continue to do so until such time as it is legally established that I am not qualified to do so,* and that I will not accept a court-appointed attorney." (Emphasis supplied.) (Rep. Tr. Vol. 1, p. 4) In other words here was Chessman advised by the court of the limitation he was placing upon himself with reference to his rights by acting as his own counsel, and being placed upon such notice, Chessman stated that he wished to continue to act as his own attorney until the question of his sanity might disqualify him in that regard.

So it was that throughout the trial Chessman was not represented by counsel, although the fact is that legal services were furnished him at all stages of trial by Deputy Public Defender Matthews. The extent of such legal services is reflected in the record for whatever they may be.

At this point before the commencement of the jury trial Chessman was on notice that he was about to indulge in a deadly contest with justice in which his liberty and possibly his life might be forfeited. He was on notice when he rejected counsel that conviction might ensue which would place him in that status of a felon, a person whose rights are far different from those not so disabled. Chessman was on notice at that time that it is not the law in California nor of any other jurisdiction to our knowledge that felons awaiting execution are permitted to make personal appearances in connection with proceedings after judgment. These considerations must be measured against his claim that he was entitled to be personally present upon the settlement proceedings. Chessman was not authorized to increase his rights under either federal or state constitutions by representing himself at the trial, suffering confinement upon conviction, and then urging that because he had refused an attorney in the first instance, he became entitled to fill that gap by again acting as his attorney in connection with settlement procedure. If conduct or other action can make out a waiver of the right to counsel, then conduct in the face of notice can also make out a forfeiture of the right to be present in later proceedings such as here. And certainly there is no doubt that the right to counsel can be waived (*Adams v. United States ex rel. McCann* (1942), 317 U.S. 269, 279 [63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435]; cf. *People v. Chesser* (1947), 29 Cal. 2d 815, 822 [178 P.2d 761]; *People v. Justice*, 125 Cal. App. 2d 572).

Any alleged denial of due process by virtue of the fact that petitioner was not present at the settlement of the record in the state court has been waived. Petitioner asserts that he was denied due process since he was not given the opportunity to defend against the disputed transcript in the state court. Petitioner's contention in the state court concerning representation of counsel at the settlement proceedings was not that he was not permitted to have counsel of his own choosing, or appointed counsel to represent him in these hearings, but simply that he should have been allowed to appear personally in the proceedings. To the extent that his present contention is different, he has waived the contention. Petitioner did participate to the extent that he prepared a long list of objections to the proposed record.

As the decision of *Chessman v. Teets*, 221 Fed. 2d 276, at 278, stated:

> "* * * Chessman also contends that he was denied effective representation of counsel. He initially had counsel whom he relieved on March 12, 1948, the day he entered his pleas of not guilty. Thereafter he litigated until the instant proceedings in propria persona, repeatedly refusing proffered counsel at his criminal trial and in subsequent proceedings. On one of the occasions when he refused proffered counsel he stated to the court: 'I think I am a good enough lawyer.' The court then asked him, 'You don't want to trust it to a lawyer?' Chessman responded: 'I don't want to do it.' Chessman finally agreed to allow an attorney to act merely as a legal adviser. *Nowhere in his application does he allege that he demanded counsel after his persistent refusals of such aid.* Chessman waived his right to counsel and is now precluded from urging denial of his constitutional right upon this ground." (Emphasis supplied.)

As pointed out, petitioner's contention has never been that he was deprived of counsel at proceedings to settle the

record, but his contention was that he was his own counsel and he must be allowed to be present. If his contention now is that he was deprived of the right to be represented by counsel at these hearings, he has waived the objection by failing to raise the objection on appeal in the state court. He may not use the writ of habeas corpus as a writ of error.

Furthermore, the California Supreme Court determined the question of petitioner's right to be present as follows:

> "Defendant urges that he should have been allowed to appear personally in the proceedings which resulted in the present reporter's transcript, and that he should now be allowed to appear personally before the trial judge in support of his position. Since the entry of the judgments of conviction defendant has been lawfully imprisoned awaiting determination of his appeal. He is presently lawfully confined in San Quentin. He was not and is not entitled as a matter of right to go about the state making appearances before Courts. * * *" *People v. Chessman*, 35 Cal. 2d 455, at 467.

The reporter's transcript contains thirty-five instances wherein petitioner personally stated that he had elected to represent himself as his own attorney. This is not the type of situation presented in *Powell v. Alabama* (1932), 287 U.S. 45. The dissimilarity between the defendant Chessman and the defendants in the *Powell* case is startling. Chessman presents a picture of intelligence and literacy, the latter having been demonstrated by his writings; and further, his past contacts with the law cast upon him a certain familiarity with its procedures. In *Chessman v. Teets*, 221 F.2d 276, at 277, Judge Denman says of Chessman:

> "The many proceedings before us show Chessman to be a person of extraordinary ability, with experience in criminal procedure since 1941 in four prior cases, three charging armed robbery, in which he was convicted, three by plea of guilty and another after trial.

His voluminous citations of cases supporting his various contentions are worthy of an experienced criminal practioner."

On the other hand, in the *Powell* case we have defendants described by the court in terms of ignorance and illiteracy, feeblemindedness, and the like, precluding an adequate personal defense without counsel. We think it fair to state that California did all within its power to bring home to Chessman an awareness of the consequences which might ensue to him by virtue of conducting his own defense.

The talents of Chessman defeat any contention that this man was not capable of waiving counsel under the circumstances of this case (*Johnson v. Zerbst* (1938), 304 U.S. 458; *Betts v. Brady* (1942), 316 U.S. 455, 464).

THE PROCEDURE USED BY THE CALIFORNIA COURT IN SETTLING THE TRIAL RECORD WAS ADEQUATE AND DID NOT DENY PETITIONER DUE PROCESS OF LAW

A state is not required under the due process clause to provide an appella e procedure for review of a criminal trial (See *Brown v. Allen*, 344 U.S. 443, at 486; *McKane v. Durston*, 153 U.S. 684, at 687).

However, such appellate procedures must not be discriminatory. See *Cochran v. Kansas* (1942), 316 U.S. 255 (prison officials prevented the filing of an appeal); *Dowd v. Cook*, 340 U.S. 206 (prison officials prevented the fiilng of an appeal); *Cole v. Arkansas*, 333 U.S. 196 (defendant's convictions were affirmed under a criminal statute for violation of which they had not been charged).

The procedure in California for the settlement of a record where a court reporter dies before transcribing his notes was set out in *People v. Chessman*, 35 Cal. 2d 455. This was and is the law of California. This procedure was reasonable, and in no way discriminatory as to Chessman.

Procedures for the determination of the record in similar cases has been approved by several State courts. See note, 19 A.L.R. 2d 1098. Also see *Dowdell v. United States*, 221 U.S. 325.

The procedure used in this particular case is not dissimilar to the common law procedure or the procedure followed by numerous states until very recently in the settlement of bills of exceptions.

The procedure used in the State court to determine the accuracy of the record included the appointment of one of the deceased reporter's former employees to transcribe the notes of the deceased reporter. This reporter was aided by the notes which had been taken by the judge during the trial. A copy was sent to Chessman. He submitted a written "Motion to Correct and Augment Record" in which he requested numerous changes. The trial judge heard the written objections to the record, he allowed some and disallowed others. The reporter certified the record as being full and complete to the best of his ability. The trial judge certified that "the objections made to the transcript herein have been heard and determined and the same is now corrected in accordance with such determination * * * and the same is now, therefore, approved by me * * *" (See *People v. Chessman*, 35 Cal. 2d. 455, at 459).

Likewise, Chessman submitted a long list of corrections to the California Supreme Court in the proceedings held before that court. Indeed, we have noted that Judge Goodman expressly found that there was no fraudulent or unlawful conduct in the preparation of the transcript on appeal by the deputy district attorney and no misrepresentation to the trial judge for the purpose of inducing the trial judge to settle the record. The district judge likewise found that there was no fraud or collusion between the deputy district

attorney, the substitute reporter, and the judge in the settlement of the record. The district court expressly found that Fraser, the substitute court reporter, was especially competent to transcribe Perry's notes and did so, with fairness and competence. Furthermore, the district court expressly found that Fraser and Leavy and the trial judge "endeavored to and did arrange for and completed the transcript in Chessman's case in the best of good faith and with diligence and fairness, so that a fair and correct record could be provided the Supreme Court of California upon Chessman's automatic appeal to that court." *Chessman v. Teets*, 138 F.Supp. 761, at 766.

As is pointed out by the Supreme Court of California in the decision of *People v. Chessman*, 35 Cal. 2d 455, at 462, 465, even if all of the inaccuracies and omissions claimed by Chessman were allowed, the result on appeal would nevertheless not have been affected.

Avery v. Alabama, 308 U.S. 444 (1940) presents a case resulting in a murder conviction following a trial of very short duration. The petitioner was presented by court appointed counsel who requested a continuance of the cause so as to better prepare the defense. The continuance was denied and after conviction of petitioner and after motion for a new trial, the Supreme Court refused to reverse the judgment upon the ground that no showing had been made that the granting of additional time would have occasioned a different or better defense. As stated by the Court at page 452: "That the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted."

As we read the *Avery* case, it seems to impose upon a petitioner the requirement that he make a factual presentation that alleged lack of due process has resulted in a situation different in some manner to his defense or position than would have existed had this disability not been placed upon him. In other words, in the *Avery* case the burden was upon defense counsel to demonstrate that the granting of additional time would have permitted a different or a better defense.

Is it not then incumbent upon Chessman to have demonstrated in the past and to demonstrate to this Court that in some heretofore unexplained manner his personal appearance at the trial transcript settlement proceedings would have enabled him to do more than or other than that which he did? Is it not further incumbent upon Chessman to demonstrate to this Court that there were other objections not made by Chessman in writing which could have been made with material difference to the case upon appeal? Along these lines we again refer the attention of this Court to the statement found in the California decision that allowing all of Chessman's objections the results upon appeal would have been the same.

THE PROCEDURE USED FOR SETTLEMENT OF THE TRIAL TRANSCRIPT WAS NO PART OF THE TRIAL PROPER AND INHERENTLY AS A FACT OCCURRING AFTER TRIAL IS APPELLATE IN NATURE AND ACORDINGLY RIGHTS EXISTING UNDER DUE PROCESS ARE NOT TO BE MEASURED AS AGAINST TRIAL REQUIREMENTS

California has had other instances of proceedings following conviction as illustrated by *People v. Martin* (1947), 78 Cal. App. 2d 340; *People v. Russell* (1934), 139 Cal. App. 417. Admittedly, the cases are factually different from the instant case; but they are illustrative of the great differ-

ences existent between a trial proper and proceedings following trial. Both cases refused to permit personal appearances by imprisoned felons.

The *Russell* case is an instance of refusal to permit the prisoner to appear in court for purposes of urging a motion, which refusal was attacked as being in conflict with the constitutional right to appear and defend. The court states at page 419:

> "Assuming that the point is one which can be raised on this appeal, we are satisfied that it is without merit. Section 13 of article I of the Constitution gives a defendant the right to appear and defend in person and with counsel 'in criminal prosecutions.' This right to be present throughout a criminal trial has been recognized both at common law and by statute and the decisions relating to that right are in practical harmony. In general the rulings are that it is essential to a valid trial that he should be present, not only when arraigned, 'but at every subsequent stage of the trial.' (16 C. J., p. 813; 12 Cyc. p. 523.) There is some conflict in the decisions as to the necessity of defendant's presence on preliminary motions and motions for new trial or in arrest of judgment. (16 C. J., p. 816.) But we have found no conflict in the holdings that his presence is not necessary after entry of judgment at the hearing of an appeal or other review of the judgment. (12 Cyc., p. 526; 8 R. C. L., p. 91; Schwab v. Berggren, 143 U.S. 442, 448 [12 Sup. Ct. 525, 36 L.Ed. 218]; Dowdell v. United States, 221 U.S. 325, 331 [31 Sup. Ct. 590, 55 L.Ed. 753]; Hogan v. State, 42 Okl. Cr. 188 [275 Pac. 355, 357].)
>
> The reason for the ruling requiring defendant's presence is stated in Southerland v. State, 176 Ind. 493 [96 N.E. 583], to be, first, to enable the prosecution to identify him, and to punish him in case of conviction; and second, to secure him full facilities for defending himself as he is advised in the progress of the trial of the evidence against him. On the other hand, as said

in Schwab v. Berggren, supra, page 449, 'neither reason nor public policy require that he shall be personally present pending proceedings in an appellate court whose only function is to determine whether, in the transcript submitted to them, there appears any error of law to the prejudice of the accused.' * * *".

As a trial does not commence until the jury is called into the box to be examined as to qualifications, so also a trial concludes when the jury's verdicts are returned and they are discharged. As stated in *Berness v. State* (1955), 83 So. 2d 607 at 618:

> "In a criminal cause, the term 'trial' does not include the arraignment or other merely preparatory proceeding which may be taken prior to the time of the administering of the requisite oath to the jurors. Byers v. State, 105 Ala. 31, 16 So. 716, 717, supra; Hunnel v. State, 86 Ind. 431, 434; McCall v. United States, 1 Dak. 320, 46 N.W. 608, 611; United States v. Curtis, 25 Fed. Cas. pages 726, 727, No. 14,905; Commonwealth v. Soderquest, 183 Mass. 199, 66 N.E. 801, 802. The word 'trial' when used in connection with criminal proceedings means proceedings in open court, after pleadings are finished, down to and including rendition of the verdict. Rosebud County v. Flinn, 109 Mont. 537, 98 P. 2d 330, 333."

The California Supreme Court in *People v. McKamy* (1914), 168 Cal. 531, adopts substantially the same definition of "trial" in these words at page 535:

> "* * * In criminal cases, it embraces steps tending to and culminating in a judgment of conviction or acquittal. An appeal is no part of a trial. It is a means for remedying errors which have occurred at a precedent trial."

Looking to the settlement procedure and the authority from which it derived, we find this set forth in the Rules on Appeal as formulated by the Judicial Council at page v:

> "The RULES ON APPEAL, including the Rules on Original Proceedings in Reviewing Courts (to be cited as Rules on Appeal) *govern appeals* from superior courts and original proceedings in the Supreme Court or District Courts of Appeal." (Emphasis supplied.)

These rules were adopted pursuant to Section 1247k of the California Penal Code:

> "The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the *time and manner* in which the records on such appeals shall be made up and filed, in all criminal cases in all courts of this State." (Emphasis supplied.)

To further demonstrate that Chessman's claimed rights are not concerned with the trial process but are concerned exclusively with an appellate proceeding, reference is made to Section 1239(b) of the California Penal Code:

> "When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel."

At the very moment of judgment the superior court was divested of jurisdiction save that it was acting as an agency of the Supreme Court in preparing the transcript (*Associated Lumber & Box. Co. v. Superior Court of Calaveras County* (1947), 79 Cal. App. 2d 577 [180 P.2d 389]; *Clemens v. Gregg*, 34 Cal. App. 272 [167 P. 299]; California Penal Code § 1246).

The settlement proceeding being no part of the trial proper, and Chessman having been already accorded a full and fair hearing with the inescapable fact of judgment rendered against him, his rights are not now to be measured against the high standard of trial requirements as opposed to appellate process requirements. There has been a complete hearing here and we are now concerned only with the

adequacy of review. California by statute precludes felony prosecution unless the defendant be personally present, but as the statute reads, it refers only to being "personally present at the trial;" (California Penal Code, § 1043). Here again, Chessman was proceeding as his own counsel facing the possibility of conviction and confinement upon clear notice by this statute that his personal presence was guaranteed by law only "at the trial." As to federal courts the Sixth Amendment confers upon the accused rights relating to proceedings in criminal prosecutions. There is no mention there made of the right to appearance at proceedings following judgment.

Chessman elected to proceed charged with notice and knowledge that the right to personal appearance was guaranteed by California statute only with reference to the trial. He was also charged with the knowledge of possibility which became a reality, to wit: The death of the reporter and therefore the choice given to proceed by a settled statement method or to refuse to act and to be subject to the procedure as ultimately adopted. Chessman was charged with knowledge of the fact that no new trial would be possible in the event the reporter of his trial had died (California Penal Code, § 1181). Chessman elected to proceed in the face of these provisions of law and because he misjudged his rights and possibly entertained some notion that his rights as a convicted and confined felon would be greater than other persons in the same class does not create a violation of due process.

Price v. Johnston, 334 U.S. 266 at 286 holds with reference to personal appearance on the part of a prisoner with reference to an appellate proceeding:

> "Oral argument on appeal is not an essential ingredient of due process and it may be circumscribed as to prisoners where reasonable necessity so dictates."

THERE WAS NO LACK OF DUE PROCESS UNDER THE CIRCUMSTANCES OF THIS CASE BY FAILURE OF CHESSMAN TO BE PRESENT AT THE HEARING IN CONNECTION WITH SETTLING THE TRIAL TRANSCRIPT

As the Court has stated in its order, the question of due process must be related to all of the facts of the present case. Due process is elusive when sought to be defined. Perhaps there are as many definitions as there are cases. A lengthy discussion of due process is found in *Twining v. State of New Jersey* (1908), 211 U.S. 78. The *Twining* case furnishes an elastic definition to the phrase, one suited to changing concepts, but yet one which furnishes as an aid the example of history. Along those lines the *Twining* case suggests at page 107; "One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law." For other definitions see *Rochin v. California*, 342 U.S. 165; Willoughby on the Constitution of the United States, Vol. 2, Chapter xci; Taylor, Due Process of Law, The Origin of Due Process set forth in the introduction; The Fourteenth Amendment by Brannan, Chapter xi; 25 A.L.R. 2d 1407.

STATE CRIMINAL PROCEDURE AND DUE PROCESS REQUIREMENTS

"The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. Ex parte Reggel, 114 U.S. 642; Iowa Central Railway v. Iowa, 160 U.S. 389; Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226. 'The Fourteenth Amendment does not profess to secure to all persons in the

United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial jury, and on the other side no such right. Each State prescribes its modes of judicial proceeding.' Missouri v. Lewis, 101 U.S. 22, 31." (*Brown v. New Jersey* (1899), 175 U.S. 172, at 175.)

These cases are founded upon the proposition that in our federal system the administration of criminal justice is primarily committed to the care of the states (*Rochin v. California*, 342 U.S. 165; *Irvine v. California*, 347 U.S. 128). So far as the power of California to provide for the proceeding here utilized there can be no question. The only challenge, of course, lies to the question of the fairness of the procedure and the fairness of the procedure employed is to be measured against this language of the Supreme Court in *Ownbey v. Morgan*, 256 U.S. 94, at 110:

> "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement, and with provision against every possible hardship that may befall."

THE LAW OF THE LAND HAS NOT HERETOFORE FOUND THE SETTLEMENT PROCEEDING TO BE LACKING IN DUE PROCESS

Definitions of due process inevitably wind their way toward the remote corners of English history; in fact to the time of the adopting of the Magna Carta.

> "* * * that the words 'due process of law' are equivalent in meaning to the words 'law of the land' contained in that chapter of Magna Carta, which provides that 'no freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful

judgement of his peers or by the law of the land.'" (*Twining v. New Jersey* (1908), 211 U.S. 78, at 100)

And in the United States the law of the land is, of course, the law as it exists throughout the union.

> "* * * This court has never attempted to define with precision the words "due process of law." * * * It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' Holden v. Hardy, 169 U.S. 366, 389. 'The same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' In re Kemmler, 136 U.S. 436, 448. 'The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.' West v. Louisiana, 194 U.S. 258, 263." (*Twining v. New Jersey* (1908), 211 U.S. 78, at 101 and 102)

Procedures highly similar to, if not identical with, that employed by California in the Chessman situation—although admittedly procedures not operating upon identical facts—have been approved by other state courts. This is the law of the land so far as these other jurisdictions are concerned (See Note 19, A.L.R. 2d 1098).

Under California law it has been held that Chessman did not have the right to make a personal appearance in connection with the settlement proceedings. Furthermore, we believe it to be the law of all of the other states that prisoners undergoing confinement and awaiting execution of the death penalty are deliberately restrained in their pub-

lic appearances if only for public safety. This is the law of the land.

THE DUE PROCESS REQUIREMENTS WITH REFERENCE TO THE PUBLIC SAFETY AND THE CONSTITUTIONAL REQUIREMENTS OF FAIRNESS

At the time of the settling of the trial transcript Chessman was undergoing confinement awaiting execution of the death penalty, and by nature of the charges found to be true against him was a danger to public safety. Consider this language in the dissenting opinion of Justice Jackson in *Price v. Johnston* (1947), 334 U.S. 266 at 301:

> "This is one of a line of cases by which there is being put into the hands of the convict population of the country new and unprecedented opportunities to re-try their cases, or to try the prosecuting attorney or their own counsel, and keep the Government and the courts litigating their cases until their sentences expire or one of their myriad claims strikes a responsive chord or the prisoners make the best of increased opportunities to escape. I think this Court, by inflating the great and beneficent writ of liberty beyond a sound basis, is bringing about its eventual depreciation."

And yet, all of the rights of the constitution were his except as properly limited by his status as a prisoner. Chessman, to begin with, aside from his application to the California Supreme Court seeking to compel his presence before Judge Fricke, did nothing further. We submit that if due process gave him a right to be present, it was his right and his duty to exercise it. Due process and those singular rights which are inherent in the concept are subject to waiver. (*Pierce Oil Corp. v. Phoenix Refining Co.* 259 U.S. 125; *Pierce v. Somerset Railway*, 171 U.S. 641; *Wall et al. v. Parrott Silver and Copper Co.*, 244 U.S. 407; *Tinsley v. Anderson*, 171 U.S. 101). See, also *Johnson v. Zerbst*, 304 U.S. 458, at

465, holding that right to counsel may be waived. The State of California gave to Chessman a complete copy of the trial transcript. It was read following which Chessman submitted his written list of objections and corrections. When we discuss personal appearance, we must realistically ask what more could Chessman do by way of personal appearance than that which he did by way of writing. A reading of the proceedings in connection with the settling of the transcript discloses that Chessman's written objections were considered; the voiced suggestions or objections of the prosecutor were considered and depending upon the objection, Chessman's contention was allowed or disallowed; it was not a proceeding in which witnesses were examined as to the original issues in dispute at the trial; it was not a proceeding in which personal appearance was required so that Chessman could represent himself to defend the truth of the charges against him; it was not a proceeding in which Chessman was entitled to be confronted by his accusers; it was not a trial for felony in which Chessman by statute had the right to be present at all stages of the trial. What occurred has already been described by Circuit Judge Haney in his opinion set forth in *Chessman v. Teets*, U.S. Court of Appeals, 9th Circuit, Case No. 15092, Oct. 18, 1956: "It is true that in such settlement proceedings there are questions of fact to be determined. However, there are questions having to do with the settling and certification of the transcript for purposes of appeal. They involve no inquiry into the guilt or innocence of the defendant. Thus, while the substitute reporter testified at the settlement hearing, he did not appear as a witness for or against the accused."

This proceeding was appellate in nature as we have pointed out, and for that reason due process requirements were more than met by giving to a prisoner all of the time requested to prepare objections with reference to the trial

transcript and then as the record before the California Supreme Court and before Judge Goodman shows, giving full consideration to each and every one of those objections.

We submit that it is difficult to state any disadvantage to Chessman, he having exercised his right to prepare written objections. And again, we bring home to the Court the observation by the California Supreme Court that even allowing all of the Chessman objections, they would have been immaterial to the result of the appeal.

In *Market Street Railway Co. v. Railroad Commission of California* (1945), 324 U.S. 548, at 562, the court states:

> "* * * But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties."

This Court has previously found state action to be wanting in due process. Compare *Rochin v. California* (1952), 342 U.S. 165, morphine used as evidence obtained forcibly through use of stomach tube; *Irvine v. California*, 347 U.S. 128, evidence obtained in violation of constitutional rights; criticized but convictions affirmed; *Frank v. Mangum*, 237 U.S. 309, due process question in re allegation that the trial proceedings were influenced by violence and mob domination; *Powell v. Alabama* (1932), 287 U.S. 45, ignorant, illiterate defendants forced to trial without adequate services of counsel; *Tumey v. Ohio*, 273 U.S. 510, condemning judicial system which compensated trial judge from fines levied against defendants; *Moore v. Dempsey* (1923), 261 U.S. 86, trial dominated by threats of mob violence; *Thomas v. Texas*, 212 U.S. 278, discrimination based upon race; *Adams v. New York*, 192 U.S. 585, possession of policy slips prima facie evidence of intent, held not to violate due process; *Hurtado v. California*, 110 U.S. 516, discussing indictment

by grand jury and due process; *Garland v. Washington*, 232 U.S. 642, due process concerned with lack of arraignment under or plea to second information; *Brown v. Mississippi* (1936), 297 U.S. 278, confessions induced by physical torture; *Griffin v. Illinois*, 351 U.S. 12, refusal to furnish transcript based upon economic status as denial of due process; *Betts v. Brady*, 316 U.S. 455, refusal of state to appoint counsel upon request; *Gibbs v. Burke*, 337 U.S. 773, lack of counsel at trial.

These are the situations admittedly extreme, in which the court invokes its power of rebuke under the due process clause. How unlike those cases are the circumstances under which the trial transcript was settled here!

THE REQUIREMENTS OF AN APPEAL WITH REFERENCE TO DUE PROCESS

Neither California nor any other state finds lawful compulsion in the due process clause to furnish an appellate procedure for review of criminal cases. As stated in *McKane v. Durston* (1893), 153 U.S. 684, at 687:

> "• • • An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.
>
> It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper. In a large number of the States an appeal from a judgment of conviction operates as a stay of execution only upon conditions similar to those prescribed in the New York

> Code of Criminal Procedure; in others, a defendant, convicted of felony, is entitled of right to a stay pending an appeal by him. But, as already suggested, whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself."

See, also *Andrews v. Swartz* (1894), 156 U.S. 272, at 275; *Mallett v. North Carolina* (1901), 181 U.S. 589, at 598, 599.

It is for the state, then, having elected to provide an appellate procedure to insure that in application and practice it be uniform. It need not be ideal and it must be considered with reference to the circumstances which invoke it.

Chessman cannot point to a lack of equal protection in the proceedings affecting him. The proceedings in the first instance came about upon the death of the reporter Perry when Chessman refused to make application to submit the appeal upon a settled statement, and indeed sought to prohibit the appeal.

The due process element of the case and the failure of Chessman to be present at the hearing on settlement of the trial transcript must be viewed in the light of all of the circumstances of the case which have heretofore been referred to. Again, however, at the expense of repetition Chessman chose to represent himself and refused the services of counsel; Chessman refused to prepare a settled statement and sought a dismissal of the appeal; Chessman elected to defend his own cause charged with the knowledge of the operation of California statutes and Rules on Appeal; Chessman was in fact furnished the trial transcript and did in fact submit a 35-page list of corrections entitled: "Motion to Correct and Augment Record"; Chessman was afforded a complete review upon no less than three occasions by the State Supreme Court; a complete review by

federal courts, and a hearing which settled once and for all the fairness of the manner in which the trial transcript was prepared. Under the circumstances here outlined there can be no question but that any requirements of due process as they exist with reference to a convicted and confined felon have been met.

THE REPEATED DENIALS OF CERTIORARI ARE NOT WITHOUT MEANING

Although it has been stated that neither side can take comfort from such denials, nonetheless, Justice Jackson has this to say in *Brown v. Allen*, 344 U.S. 443 at pages 542 and 543:

> "* * * But, for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata as applied either by state or federal courts."

See the opinion of the Court in *Brown v. Allen* at pages 456, 457.

The exhaustive treatment of both facts and law applicable to the Chessman matter and the denials of certiorari by this court are of persuasive influence and grounds for denial again.

The state determinations as re-affirmed upon federal review are entitled to great weight in this Court (*Brown v. Allen*, 344 U.S. 443 at 457).

CHESSMAN FAILED TO PRESENT TO THE STATE COURT THE ISSUE OF REPRESENTATION BY COUNSEL AND HAS WAIVED THE QUESTION

The question here for review, insofar as petitioner now asserts that he was entitled to be represented by counsel is

a new approach to the case. It is not a contention which was originally urged upon appeal in the California Supreme Court. In that proceeding Chessman's position was clearly stated, and we quote from his opening brief in *People v. Chessman*, Crim. No. 5006, reported in 35 Cal. 2d 455:

> "This, admittedly, is an effective technique for preventing an appellant from proving that a record is prejudicially inaccurate and incomplete, that it was completed by incompetent means, and that deceit and fraud were practiced in its prepartion. It is an effective technique, but is it a legally proper one?
>
> Certainly it cannot be denied that had an attorney been representing the appellant *the* the trial court would not and could not have excluded such attorney from making any showing the attorney had desired.
>
> Therefore, it follows that the appellant was excluded from appearing at this 'settlement' and resisting the settlement of the transcript simply because he was appearing in propria persona." (pp. 45-46)

In the petition for a writ of habeas corpus filed in the United States District Court, Northern District, Southern Division, No. 34373, signed by Caryl Chessman and verified on December 29, 1954, petitioner makes this allegation with reference to counsel at page 14:

> "* * * That to preserve and protect the rights guaranteed him in this respect your Petitioner was entitled to the effective representation of counsel at all stages of the proceedings; that your petitioner has been denied and deprived of the effective representation of counsel prior to and throughout the said trial, and in particular, your *petitioner was deprived of the right to be present* at the hearing of the settlement of the reporter's transcript on the said automatic appeal, * * *" (Emphasis supplied.)

If this language is alleging a violation of due process because Chessman was not represented by counsel, it was a contention never presented for consideration to the State court. If it is merely a repetition of the claim presented to the State court that he himself had the right to be present, then the ingredient now added that he was entitled to counsel is not properly before this Court for review. Before a question may be raised in this Court, it must have been presented in the court below so that that court might have an opportunity for consideration of it. It appears here that Chessman has adopted a new theory with reference to due process and the right to counsel which was not presented to the California Supreme Court nor to the federal courts (*Brown v. Allen*, 344 U.S. 443; *Porch v. Cagle* (1952), 199 F.2d 865, Court of Appeal 5th Georgia; *Woollomes v. Heinze* (1952), Circuit Court of Appeals, 9th Circuit, California, 198 F.2d 577, cert. den. 344 U.S. 929; Annotation: "Exhaustion of state remedy as condition for issuance by federal court of writ of habeas corpus for release of state prisoner, 97 L.Ed. 543; 28 U.S.C.A. 2254).

THE FOURTEENTH AMENDMENT DOES NOT GUARANTEE RIGHT TO COUNSEL IN EVERY CASE

In *Betts v. Brady*, 316 U.S. 455 at 464, this was the issue before the court: "The question we are now to decide is whether due process of law demands that in every criminal case, whatever the circumstances, a state must furnish counsel to an indigent defendant." The court points out that the Fourteenth Amendment does not incorporate the specific guarantees found in the Sixth Amendment, and confronted with a case in which the "accused was not helpless, but was a man 43 years old, of ordinary intelligence and ability of taking care of his own interests on the trial," it

affirmed the judgment of conviction. The Court states for a guide in determining whether error exists in deprivation of counsel:

> "* * * Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed." (*Betts v. Brady* (1942), 316 U.S. 455, at 462)

In *Gibbs v. Burke* (1949), 337 U.S. 773, wherein petitioner was tried, having made neither a request for counsel nor been offered the same by the court, the court held that under these circumstances petitioner did not have a fair trial as prescribed by the Fourteenth Amendment. But again as in the *Betts* case, stated at page 780:

> "* * * We consider this case on the theory upheld in Betts v. Brady, 316 U.S. 455, that the Constitution does not guarantee to every person charged with a serious crime in a state court the right to the assistance of counsel regardless of the circumstances. Betts v. Brady rejected the contention that the Fourteenth Amendment automatically afforded such protection. In so doing, however, it did not, of course, hold or intimate that counsel was never required in noncapital cases in state courts in order to satisfy the necessity for basic fairness which is formulated in that Amendment."

It is to be noted that both of these cases are concerned with trial proceedings, not with appellate procedure. Both cases are clear that the Sixth Amendment compels no action

upon the part of the states, and if we could read the facts of the Chessman situation into the language of these cases, we think it fair to conclude that where a judicially described capable and intelligent defendant refuses counsel, he is in no position to urge due process rights in proceedings after judgment.

THE QUESTION OF DUE PROCESS OF LAW IS NOT APPLICABLE TO THE FIRST 646 PAGES OF THE TRIAL TRANSCRIPT

Grace Petermichael had worked with Reporter Perry during his lifetime. She was his transcriber. Before his death Reporter Perry had dictated his notes of the trial proceedings pertaining to pages 1 to 646 of the reporter's transcript. Reporter Petermichael listened to the voice of deceased Reporter Perry and from the sounds communicated to her transcribed the words employed in Reporter Perry's voice as Perry had stated them from his notes.

This process of preparation would have occurred except for discontinuance of the relationship between reporters Petermichael and Perry, an unlikely event, whether or not Reporter Perry had lived or died, so that Chessman is in no position to challenge the method of preparation nor the accuracy of the first 646 pages. The great significance of the first 646 pages is found by considering the evidence with reference to counts 7 and 11. As reported in *People v. Chessman*, 38 Cal. 2d 166, 172, with reference to each offense:

> "* * * (7) Kidnaping Regina for the purpose of robbery, with infliction of bodily harm; punishment fixed at death * * *"
>
> "* * * (11) Kidnaping Mary for the purpose of robbery, with infliction of bodily harm; punishment fixed at death * * *"

Note that these are the counts, proof of which impelled the jury to impose the death penalty. Count 7 related to

Regina E. Johnson whose testimony lies within the first 646 pages of the transcript on pages 55 to 166. There is other testimony from Regina Johnson commencing at page 1516 and concluding at page 1522. The testimony of witness Johnson contained within the first 646 pages of the trial transcript prepared by Reporter Petermichael from Reporter Perry's dictation contains the identification of Chessman by the witness as the man who kidnaped her and who forced her to submit to acts of sexual degradation.

As to count 11, this is concerned with the witness Mary Alice Meza, again contained entirely within the first 646 pages of the transcript on pages 374 to 444, prepared by Reporter Petermichael from Reporter Perry's dictation and contains the identification of Chessman by the witness as the man who kidnaped her and who forced her to submit to acts of sexual degradation.

The foregoing must now be related to "Appellant's Closing Brief" prepared by Chessman and filed in the Supreme Court of the State of California on July 6, 1951, wherein at page 267 Chessman at that time in discussing count 7 (Regina Johnson's kidnaping and bodily harm count) said, "The facts as there set out at page 304 are not disputed by respondent as being correct * * * Not challenging the correctness of the facts, respondent concludes * * *". On page 268 of the same brief Chessman again discusses the Johnson kidnaping, and with reference to certain portions of the evidence states: "This is a correct statement of the evidence." Relating this language found at pages 267-268 of appellant's closing brief we turn now to page 303 of appellant's opening brief, volume two, where commencing at page 303 and continuing to page 304 we find an extensive quotation of the trial testimony taken from reporter's transcript page 67, lines 1-18, which states:

"The trial record divulges these facts—

The kidnaper orally commanded the victim, Regina Johnson, out of the car she was occupying back (a distance of twenty-two feet) to the car he was operating; she complied (Rep. Tr. 63, line 17, to 64, line 15).

While both kidnaper and victim were seated in the front seat of the kidnaper's vehicle, the kidnaper exposed his penis (Rep. Tr. 67, lines 12-14).

'Q. [By prosecutor] What next was done or said?

A. He made me use my mouth on his privates.

Q. Did you do that under compulsion, at the point of the gun?

A. That is right.

Q. By reason of threats he made in regard to you and Mr. Lea?

A. Yes.

Q. That he would kill you or you would be taken away in a casket?

A. That is right.

Q. Did the [kidnaper] expose his private parts to you, his penis?

A. That is right.

Q. Did he place his penis in your mouth?

A. He made me put my mouth over it.

Q. Was his penis in your mouth?

A. Yes.' (Rep. Tr. 67, lines 1-18)"

If Chessman in 1951 *was conceding the correctness of the testimony of Regina Johnson* which was the testimony connected to one of the death penalty counts, does not this concession take from him the right to urge the lack of due process founded upon an allegedly defective preparation procedure? If the record here is correct, what requirement then for an appearance by Chessman?

The attention of this Court is invited to Chessman's briefs submitted to the Supreme Court of the State of California upon the automatic appeal. Reading Volume One,

particularly with reference to counts 7 and 11, we find therein no attack upon the sufficiency of the evidence as to these counts. In Volume Two of appellant's opening brief is found a criticism of the verdict with reference to count 7, but only on the theory that the evidence did not make out bodily harm. Apparently it was not Chessman's contention that the evidence that was reported was incorrect, but merely that what he did, did not in law constitute bodily harm. Chessman also attacked count 7, but only contending that he did not kidnap for the purpose of robbery—again no head-on challenge to the sufficiency of the evidence.

A DISCUSSION OF THE RELIEF REQUESTED BY PETITIONER

Petitioner is asking by way of relief that this Court order a second hearing, identical to the recently concluded hearing conducted before Judge Goodman at which petitioner would be permitted to cross-examine witnesses produced by the state; to test the competency of the reporter; to produce witnesses and evidence in support of his claims that the shorthand reporter's notes were undecipherable; to prove Reporter Fraser's transcript is completely and grossly inaccurate. This plea plays a game with the Court. At the hearing before Judge Goodman at which petitioner was given the right to go into these very things, he actually produced nothing—not a single witness. In fact the State of California arranged for the presence of all of the witnesses to the proceeding; it paid for the travel and living expenses of Cecil J. Luskin, deputy clerk of the Superior Court of Los Angeles; Reporter Fraser; deputy district attorney Leavy; Judge Fricke; Paul Burdick, retired court reporter; Nana Bull and Mary Graves, jurors at the Chessman trial; the State of California brought Paul De Noia, deputy clerk of the California Supreme Court to the federal

court together with his records; and the State of California produced Chessman himself pursuant to Judge Goodman's previous order, and also produced George S. Jones, clerk of the Superior Court of Marin County. It is true certain of the witnesses present were called first by petitioner. Such was possible only because in the first instance the State in cooperation with the court and in order to have a full and complete hearing arranged for the presence of all of the witnesses referred to. Despite the fact that the Chessman hearing had been noticed for a great length of time, petitioner appeared in court that day with no witnesses, save those furnished by the state, with no depositions having previously been taken. What possible purpose could a second hearing serve in face of the demonstrated inability of Chessman to present anything beyond the wildest and most unsupported allegations.

We submit further that in appraising this relief the Court should bear in mind that it is being asked to do again what it did once for Chessman by referring the question of fraud in the preparation of the transcript to the District Court Judge. The relief requested that petitioner be discharged is, we submit, beyond the jurisdiction of this Court. The relief again requested in paragraph IX, subsection 2, that the state trial court shall conduct a new hearing is again merely asking the California Superior Court to do what Judge Goodman has already done.

The relief requested should also be appraised in light of the fact that Mary Alice Meza, principal witness with reference to count 11 which entailed the death penalty, has been and is presently confined at Camarillo State Hospital, Department of Mental Hygiene; illness has been diagnosed schizophrenia. Jarnigan Lea, another important witness at the Chessman trial was killed in an automobile accident some years ago. He was the escort of Regina Johnson who

was the kidnap victim of Chessman concerning count 7. An investigator, Arnold Hubka, has died of cancer, he having testified at the trial that he found in Chessman's possession a small nut which proved to have been taken from the spotlight of the stolen car Chessman used during his numerous offenses.

CONCLUSION

This litigant has been furnished hearings and reviews thus far without end. The hand of justice has been stayed time and again, if only to review questions already adjudicated or theories newly contrived. The lack of substance to Chessman's claims has been pronounced only after careful review, and on occasions the frivolity of his pleas has been condemned.

We submit that under the circumstances, no lack of due process appears, and strongly urge the Court to deny the relief requested.

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